In re: PMD PRODUCE BROKERAGE CORP.
PACA Docket No. D-99-0004.
Decision and Order on Remand.
Filed November 26, 2001.

PACA – Failure to pay – Discharge of official duties – Burden of proof – Preponderance of the evidence – Due process – Petition to reopen hearing – Publication of facts and circumstances.

The Judicial Officer (JO) affirmed the Initial Decision and Order on Remand issued by Chief Administrative Law Judge (ALJ) James W. Hunt concluding Respondent committed repeated, flagrant, and willful violations of the Perishable Agricultural Commodities Act, 1930 (PACA), by failing to make full payment promptly for produce. The JO rejected Respondent's contention that the ALJ failed to consider the evidence before issuing a decision. The Judicial Officer stated that in the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties. ALJs must consider the record in a proceeding prior to the issuance of a decision in that proceeding and an ALJ is presumed to have considered the record prior to the issuance of his or her decision. The JO refused to draw an inference from a similarity between a party's filing and an ALJ's decision that the ALJ failed to properly discharge his or her duty to consider the record prior to the issuance of a decision. The JO also rejected Respondent's contention that the ALJ's findings of fact were unreliable. The JO concluded, after reviewing the record, that the ALJ's findings of fact were supported by reliable, probative, and substantial evidence. Moreover, the JO stated Complainant proved by a preponderance of the evidence that Respondent violated 7 U.S.C. § 499b(4), as alleged in the Complaint. The JO further rejected Respondent's contention that it was denied due process. Finally, the Judicial Officer denied Respondent's petition to reopen the hearing. As Respondent no longer had a PACA license, the JO ordered the publication of the facts and circumstances set forth in the Decision and Order on Remand.

Ruben D. Rudolph, Jr., for Complainant.
Paul T. Gentile, for Respondent.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

PROCEDURAL HISTORY

The Associate Deputy Administrator, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on November 16, 1998. Complainant instituted the proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s) [hereinafter the PACA]; the regulations promulgated pursuant to the PACA (7 C.F.R. pt. 46) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) during the period February 1993 through September 1996, PMD Produce Brokerage Corp. [hereinafter Respondent] failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45 for 633 lots of perishable agricultural commodities, which Respondent purchased, received, and accepted in interstate commerce; and

(2) Respondent's failures to make full payment promptly of the agreed purchase prices for perishable agricultural commodities that Respondent purchased, received, and accepted in interstate and foreign commerce constitute willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) (Compl. ¶¶ III-IV). Respondent filed an "Answer" on January 6, 1999, denying the material allegations of the Complaint (Answer ¶¶ 3-4).

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] scheduled a hearing for November 17, 1999 (Notice of Hearing filed September 7, 1999). On November 12, 1999, Complainant filed a "Motion for Bench Decision" and "Complainant's Proposed Findings of Fact, Conclusions, and Order," requesting that the ALJ issue a decision orally at the close of the hearing in accordance with section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)). Respondent received a copy of Complainant's Motion for Bench Decision and Complainant's Proposed Findings of Fact, Conclusions, and Order on November 15, 1999 (Tr. 6).

On November 17, 1999, the ALJ presided over a hearing in New York, New York. Deborah Ben-David, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant.[1] Paul T. Gentile, Gentile & Dickler, New York, New York, represented Respondent. During the November 17, 1999, hearing, Respondent requested that the ALJ refrain from issuing a decision orally at the close of the hearing to provide Respondent additional time within which to submit proposed findings of fact, conclusions, order, and a brief in support of proposed findings of fact, conclusions, and order (Tr. 94).

The ALJ denied Respondent's request and issued a decision orally at the close of the November 17, 1999, hearing. The ALJ: (1) found, during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45 for 633 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce; (2) found a compliance review conducted between October 20, 1999, and November 1, 1999, revealed Respondent continued to owe approximately $769,000 for purchases of perishable agricultural commodities from produce sellers listed in the Complaint; (3) concluded Respondent's failures to make full payment promptly of the agreed purchase prices for 600 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce, as specified in the Complaint, are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)); and (4) ordered publication of the facts and

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[1]On January 13, 2000, Jane McCavitt entered an appearance on behalf of Complainant (Notice of Appearance). On August 3, 2001, Ruben D. Rudolph, Jr., entered an appearance on behalf of Complainant and gave notice that he was replacing Jane McCavitt as counsel for Complainant (Notice of Substitution of Counsel).

circumstances of Respondent's violations (Tr. 95-101). On November 30, 1999, the ALJ filed a "Bench Decision," which is the written excerpt of the decision orally announced at the close of the November 17, 1999, hearing.

On January 7, 2000, Respondent filed a petition to reopen the hearing and appealed to the Judicial Officer. On February 14, 2000, Complainant filed "Complainant's Response to Respondent's Appeal." On February 15, 2000, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's petition to reopen the hearing and a decision. On February 18, 2000, I denied Respondent's January 7, 2000, appeal petition on the ground that it was late-filed. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal).

On March 15, 2000, Respondent filed "Respondent's Petition for Reconsideration." On March 29, 2000, Complainant filed "Complainant's Response to Respondent's Motion for Reconsideration." On March 30, 2000, the Hearing Clerk transmitted the record to the Judicial Officer for reconsideration of *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal). On March 31, 2000, I denied Respondent's Petition for Reconsideration. *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 351 (2000) (Order Denying Pet. for Recons.).

Respondent sought judicial review of the Order Denying Late Appeal. The United States Court of Appeals for the District of Columbia Circuit reversed the Order Denying Late Appeal. *PMD Produce Brokerage Corp. v. United States Dep't of Agric.*, 234 F.3d 48 (D.C. Cir. 2000).

On February 2, 2001, I held a telephone conference with counsel for Complainant and counsel for Respondent. Counsel informed me that neither Complainant nor Respondent would seek further judicial review of *In re PMD Produce Brokerage Corp.*, 59 Agric. Dec. 344 (2000) (Order Denying Late Appeal). I informed counsel that I was troubled by the ALJ's denial of Respondent's request for an opportunity to submit proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)). Complainant and Respondent requested the opportunity to brief the issue of Respondent's opportunity to submit proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)). I granted Complainant's and Respondent's requests for the opportunity to brief the issue. On March 2, 2001, Complainant filed "Complainant's Objection to Remanding Case to Administrative Law Judge for Further Procedures." On April 4, 2001, Respondent filed "Respondent's Brief in Support of Judicial Officer Remanding to the Administrative Law Judge for Further Procedure."

On April 5, 2001, the Hearing Clerk transmitted the record to the Judicial

Officer for a ruling on Respondent's January 7, 2000, petition to reopen the hearing and a ruling on the issue regarding remand to an administrative law judge. On April 6, 2001, I denied Respondent's petition to reopen the hearing and remanded the proceeding to Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] to: (1) provide Respondent with an opportunity to submit for consideration proposed findings of fact, conclusions, order, and a brief in accordance with section 1.142(b) of the Rules of Practice (7 C.F.R. § 1.142(b)); and (2) issue a decision. *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. 364 (2001) (Order Denying Pet. to Reopen Hearing and Remand Order).

On May 17, 2001, Respondent filed "Respondent's Proposed Findings of Fact, Conclusions and Order." On June 6, 2001, the Chief ALJ issued a "Decision on Remand" [hereinafter Initial Decision and Order on Remand] in which the Chief ALJ adopted the ALJ's November 30, 1999, Bench Decision.

On July 25, 2001, Respondent filed "Respondent's Petition for Reconsideration" requesting that the Chief ALJ reverse the Bench Decision and the Initial Decision and Order on Remand or order a new hearing. On September 7, 2001, Complainant filed "Complainant's Reply to Respondent's Petition for Reconsideration." On September 12, 2001, the Chief ALJ issued "Order Denying Petition for Reconsideration."

On October 22, 2001, Respondent filed a petition for a new hearing and appealed to the Judicial Officer. On November 9, 2001, Complainant filed "Complainant's Response to Respondent's Appeal." On November 15, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's petition for a new hearing and a decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order on Remand. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, except for minor, non-substantive changes, the Chief ALJ's Initial Decision and Order on Remand as the final Decision and Order on Remand. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion as restated.

Complainant's exhibits are designated by "CX." Transcript references are designated by "Tr."

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

. . . .

CHAPTER 20A—PERISHABLE AGRICULTURAL COMMODITIES

. . . .

§ 499b. Unfair conduct

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce:

. . . .

(4) For any commission merchant, dealer, or broker to make, for a fraudulent purpose, any false or misleading statement in connection with any transaction involving any perishable agricultural commodity which is received in interstate or foreign commerce by such commission merchant, or bought or sold, or contracted to be bought, sold, or consigned, in such commerce by such dealer, or the purchase or sale of which in such commerce is negotiated by such broker; or to fail or refuse truly and correctly to account and make full payment promptly in respect of any transaction in any such commodity to the person with whom such transaction is had; or to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any such transaction[.]

§ 499h. Grounds for suspension or revocation of license

(a) Authority of Secretary

Whenever (1) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (2) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n(b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender.

. . . .

(e) Alternative civil penalties

In lieu of suspending or revoking a license under this section when the Secretary determines, as provided in section 499f of this title, that a commission merchant, dealer, or broker has violated section 499b of this

title or subsection (b) of this section, the Secretary may assess a civil penalty not to exceed $2,000 for each violative transaction or each day the violation continues. In assessing the amount of a penalty under this subsection, the Secretary shall give due consideration to the size of the business, the number of employees, and the seriousness, nature, and amount of the violation. Amounts collected under this subsection shall be deposited in the Treasury of the United States as miscellaneous receipts.

7 U.S.C. §§ 499b(4), 499h(a), (e).

7 C.F.R.:

TITLE 7—AGRICULTURE

. . . .

SUBCHAPTER B—MARKETING OF PERISHABLE AGRICULTURAL COMMODITIES

PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

DEFINITIONS

. . . .

§ 46.2 Definitions.

The terms defined in the first section of the Act shall have the same meaning as stated therein. Unless otherwise defined, the following terms whether used in the regulations, in the Act, or in the trade shall be construed as follows:

. . . .

(aa) *Full payment promptly* is the term used in the Act in specifying the period of time for making payment without committing a violation of the Act. "Full payment promptly," for the purpose of determining violations of the Act, means:

. . . .

(5) Payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted;

. . . .

(11) Parties who elect to use different times of payment than those set forth in paragraphs (aa)(1) through (10) of this section must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records. If they have so agreed, then payment within the agreed upon time shall constitute "full payment promptly": *Provided*, That the party claiming the existence of such an agreement for time of payment shall have the burden of proving it.

7 C.F.R. § 46.2(aa)(5), (11).

CHIEF ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER ON REMAND (AS RESTATED)

The record establishes that, as found by the ALJ in his decision orally announced at the close of the November 17, 1999, hearing, during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45 for 633 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce.

Respondent contends Complainant failed to meet its burden of proving that Respondent violated section 2(4) of the PACA (7 U.S.C. § 499b(4)). Respondent contends Complainant did not obtain information about a case pending before the United States District Court for the Southern District of New York, which relates to "extended payment terms and other matters that could directly effect [sic] the Complainant's contention that the Respondent violated the PACA" and "Complainant became aware, or should have been aware, prior to the hearing, that creditors had received payments from the Respondent pursuant to a payment plan entered between and among certain produce creditors and the Respondent[.]" (Respondent's Proposed Findings of Fact, Conclusions and Order at 2).

Section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) provides that parties may enter into a payment plan that varies the time for payment set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46.2(aa)(1)-(10)). However, such a payment plan must be reduced to writing before the parties enter into the transaction and "the party claiming the existence of such an agreement for time of payment shall have the burden of proving it." 7 C.F.R. § 46.2(aa)(11). Thus, Respondent had the burden to not only allege a written payment plan but also to prove its existence. Moreover, Respondent, as the party having the best knowledge of the court case and any alleged agreement with its creditors, had the burden of proof with respect to those matters. *Lindahl v. OPM*, 776 F.2d 276, 280 (Fed. Cir.

1985). Respondent did not meet its burden of proving the existence of its alleged payment plan.

Having considered the record in the light of Respondent's Proposed Findings of Fact, Conclusions and Order, I adopt the findings of fact, conclusion of law, and discussion in the ALJ's November 30, 1999, Bench Decision, which is the written excerpt of the ALJ's decision orally announced at the close of the November 17, 1999, hearing.

ADMINISTRATIVE LAW JUDGE'S BENCH DECISION (AS RESTATED)

Findings of Fact

1. Respondent is a corporation organized and existing under the laws of New York State. Respondent's business mailing address is 60 Kenwood Road, Garden City, New York 11530. (Answer ¶ 2.)

2. At all times material to this proceeding, Respondent was either licensed or operating subject to license under the PACA. PACA license number 860612 was issued to Respondent on February 4, 1986. Respondent's PACA license terminated on February 4, 1999, when Respondent failed to pay the annual renewal fee. (Answer ¶ 2; CX 1; Tr. 69-70.)

3. During the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45, for 633 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce (CX 4-CX 22; Tr. 34-57).

4. Between October 20, 1999, and November 1, 1999, a United States Department of Agriculture investigator contacted 16 of the 18 unpaid produce sellers to determine the status of the outstanding debts listed in the Complaint. This compliance review revealed that Respondent continued to owe approximately $769,000 for purchases that Respondent made from produce sellers listed in the Complaint during the time period set forth in the Complaint. (Tr. 31-33.)

Conclusion of Law

Respondent's failures to make full payment promptly of the agreed purchase prices for 633 lots of perishable agricultural commodities which Respondent purchased, received, and accepted in interstate or foreign commerce, as specifically alleged in paragraph 3 of the Complaint, are willful, flagrant, and repeated violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)).

Discussion

Section 2(4) of the PACA (7 U.S.C. § 499b(4)) makes it unlawful for any commission merchant, dealer, or broker to fail to make full payment promptly with respect to any transaction involving any perishable agricultural commodity made in interstate or foreign commerce. "Full payment promptly" is defined in 7 C.F.R. § 46.2(aa)(5) as requiring payment for produce purchased by a buyer, within 10 days after the day on which the produce is accepted. Section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) states that parties who elect to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46.2(aa)(1)-(10)) must reduce their agreement to writing before entering into the transaction and maintain a copy of the agreement in their records.

At the November 17, 1999, hearing, Michael Saunders, a United States Department of Agriculture investigator, testified without contradiction that the amounts alleged in the Complaint were, in fact, unpaid by Respondent and that all of these amounts involved transactions in interstate or foreign commerce (Tr. 11, 25).

Two representatives of Respondent's produce sellers, Marc Rubin of Rubin Brothers Produce Corporation and James Bevilacqua of D'Arrigo Brothers Company, testified (Tr. 61-66, 81-88). Mark Werner, the principal owner of Respondent, also testified (Tr. 90-93). There was no testimony to establish that any written agreement had been entered into between Respondent and any of its produce sellers prior to the transactions, which are the subject of this proceeding, which altered the terms of payment. None of the amounts alleged in the Complaint were paid within 10 days. In fact, as of the date of the hearing, most of the amounts still remain unpaid.

Respondent's failures to make full payment promptly of the agreed purchase prices for these 633 lots of perishable agricultural commodities over a period of approximately 42 months in amounts totaling $767,426.45 constitute repeated and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981).

Respondent's 633 violations are repeated because repeated means more than one. Respondent's violations are flagrant because of the number of violations, the amount of money involved, and the period of time during which the violations occurred.

Furthermore, Respondent's violations are willful. A violation is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if, irrespective of evil motive or erroneous advice, a person intentionally does an act prohibited by a statute or carelessly disregards the requirements of a statute. *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980)

(per curiam), *cert. denied*, 450 U.S. 997 (1981).

Respondent knew, or should have known, that it could not make prompt payment for the large amounts of perishable agricultural commodities it ordered, yet Respondent continued to make purchases. Respondent was aware of the requirements of the PACA, or should have been aware of the requirements of the PACA, yet continued to buy, knowing that each purchase would result in another violation. Respondent should have made sure that it had sufficient capitalization with which to operate. Respondent knowingly shifted the risk of non-payment to Respondent's produce sellers, who involuntarily became Respondent's creditors. Under these circumstances, Respondent intentionally violated the PACA and operated in careless disregard of the payment requirements of the PACA.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's October 22, 2001, Appeal Petition

Respondent raises four issues and petitions for a new hearing in Respondent's October 22, 2001, Appeal Petition. First, Respondent contends the ALJ did not consider the evidence when he issued a decision orally at the close of the November 17, 1999, hearing. Respondent bases this contention on the similarity between the ALJ's November 17, 1999, oral decision and Complainant's Proposed Findings of Fact, Conclusions, and Order filed November 12, 1999. (Respondent's October 22, 2001, Appeal Pet. at 3.)

In the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.[2] Administrative law judges must

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[2] *See United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating the fact that there is potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume that public officers properly discharge their duties); *INS v. Miranda,* 459 U.S. 14, 18 (1982) (per curiam) (stating although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP,* 247 U.S. 350, 353 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Chaney v. United States*, 406 F.2d 809, 813 (5th Cir.) (stating the presumption that the local selective service board considered the appellant's request for reopening in accordance with 32 C.F.R. § 1625.2 is a strong presumption that is only overcome by clear and convincing evidence), *cert. denied*, 396 U.S. 867 (1969); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6th Cir. 1966) (stating without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); *Donaldson v. United States*, 264 F.2d 804, 807 (6th Cir. 1959) (stating the presumption of regularity supports official acts of public officers and in the absence of clear evidence to the contrary, courts presume they have properly discharged their duties); *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953) (stating a presumption of regularity

attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951) (stating the presumption of regularity, which attaches to official acts, can be overcome only by clear evidence to the contrary); *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951) (holding duly appointed police officers are presumed to discharge their duties lawfully and that presumption may only be overcome by clear and convincing evidence); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948) (concluding an order of the Acting Rent Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or testimony to the contrary); *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 381-82 (9th Cir.) (stating the presumption of regularity applies to methods used by government chemists and analysts and to the care and absence of tampering on the part of postal employees), *cert. denied*, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939) (stating there is a strong presumption that public officers exercise their duties in accordance with law); *In re Lamers Dairy, Inc.*, 60 Agric. Dec. ___, slip op. at 37-40 (Aug. 16, 2001) (stating, in the absence of clear evidence to the contrary, administrative law judges are presumed to have adequately reviewed the record in a proceeding prior to the issuance of a decision in the proceeding), *appeal docketed*, No. 01C0890 (E.D. Wis. Sept. 5, 2001); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 220-22 (2000) (stating, in the absence of evidence to the contrary, Food Safety and Inspection Service inspectors are presumed to have properly issued process deficiency records), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001); *In re Dwight L. Lane*, 59 Agric. Dec. 148, 177-78 (2000) (stating a United States Department of Agriculture hearing officer is presumed to have adequately reviewed the record and no inference is drawn from an erroneous decision that the hearing officer failed to properly discharge his official duty to review the record), *aff'd*, A2-00-84 (D.N.D. July 18, 2001), *appeal docketed*, No. 01-3257 (8th Cir. Sept. 17, 2001); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 280-82 (1998) (stating, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors and investigators are presumed to have properly discharged their duty to document violations of the Animal Welfare Act); *In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1079 (1997) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Kim Bennett*, 55 Agric. Dec. 176, 210-11 (1996) (stating, instead of presuming United States Department of Agriculture attorneys and investigators warped the viewpoint of United States Department of Agriculture veterinary medical officers, the court should have presumed that training of United States Department of Agriculture veterinary medical officers was proper because there is a presumption of regularity with respect to official acts of public officers); *In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1053 (1995) (stating use of United States Department of Agriculture employees in connection with a referendum on the continuance of the Dairy Promotion and Research Order does not taint the referendum process, even if petitioners show some United States Department of Agriculture employees would lose their jobs upon defeat of the Dairy Promotion and Research Order, because a presumption of regularity exists with respect to official acts of public officers); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1494 (1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, United States Department of Agriculture), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20,

consider the record in a proceeding prior to the issuance of a decision in that proceeding.[3] An administrative law judge is presumed to have considered the record prior to the issuance of his or her decision. I draw no inference from a similarity between a party's filing and an administrative law judge's decision that the administrative law judge failed to properly discharge his or her duty to consider the record prior to the issuance of a decision. Moreover, the record establishes the ALJ presided at the reception of the evidence during the November 17, 1999, hearing. Further still, the ALJ's oral decision at the close of the hearing is supported by evidence in the record. The ALJ's presence during the reception of the evidence and the support in the record for the ALJ's oral decision belies Respondent's contention that the ALJ did not consider the evidence prior to the issuance of the oral decision. Therefore, I reject Respondent's contention that the ALJ did not consider the evidence before issuing the oral decision at the close of the November 17, 1999, hearing.

Second, Respondent contends the ALJ's factual findings are unreliable and should not serve as a basis for the Bench Decision. Specifically, Respondent contends that each witness called by Complainant acknowledged that no effort was made to review the record in a case pending in the United States District Court for the Southern District of New York regarding claims made by Respondent's unpaid produce creditors. Further, Respondent contends that each witness called by Complainant acknowledged that no effort was made to review a written agreement among Respondent and its produce creditors whereby Respondent's produce creditors agreed to extended payment terms and the waiver of their rights under the PACA. Respondent asserts that as a result of this failure to review the record in the case pending in the United States District Court for the Southern District of New York and the written agreement among Respondent and its produce creditors, the evidence introduced during the November 17, 1999, hearing was "incomplete, insufficient, and unreliable." (Respondent's October 22, 2001, Appeal Pet. at 4-5.)

I infer Respondent contends that a review of the record in the unnamed case to which Respondent refers and the written agreement among Respondent and its produce creditors would reveal that Respondent's produce creditors extended the time Respondent had to pay its debt for perishable agricultural commodities. I further infer Respondent takes the position that this purported written agreement containing extended payment terms would be sufficient to establish that Respondent

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1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting respondent's theory that United States Department of Agriculture shell egg graders switched cases of eggs to discredit respondent, in view of the presumption of regularity supporting acts of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

[3] *See* 5 U.S.C. § 556(d).

did not violate section 2(4) of the PACA (7 U.S.C. § 499b(4)).

I agree with the Chief ALJ that Respondent, as the party having the better knowledge of a case in which it was apparently a party and the agreement it made with its produce creditors, has the burden of introducing evidence regarding the case and the agreement. Moreover, while section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) provides that parties to a transaction involving perishable agricultural commodities may elect to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46(aa)(1)-(10)), the agreement must be reduced to writing before the parties enter the transaction and the party claiming the existence of the agreement has the burden of proving it.

Mark Werner, Respondent's principal owner, testified that in 1996, after Respondent stopped doing business, Respondent entered into an agreement with its creditors in accordance with which Respondent was to pay its debts over an extended period of time (Tr. 90-93). However, neither Mr. Werner nor any other witness testified that Respondent entered into written agreements electing to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46(aa)(1)-(10)) before entering into the perishable agricultural commodities transactions that are the subject of this proceeding. To the contrary, Mr. Werner's testimony establishes that the agreement Respondent made with its creditors to extend the time for payment was made in 1996 after Respondent entered the transactions that are the subject of this proceeding. Further, Michael Saunders, the United States Department of Agriculture investigator who investigated Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)), testified that, during his review of Respondent's records, he did not find any evidence of written agreements between Respondent and any of its produce sellers in which the parties elected to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46(aa)(1)-(10)) (Tr. 27).

I disagree with Respondent's contention that the evidence introduced during the November 17, 1999, hearing was "incomplete, insufficient, and unreliable." Instead, I conclude, after reviewing the record, the ALJ's findings of fact are supported by reliable, probative, and substantial evidence. Complainant proved by a preponderance of the evidence that during the period February 1993 through September 1996, Respondent failed to make full payment promptly to 18 sellers of the agreed purchase prices in the total amount of $767,426.45, for 633 lots of perishable agricultural commodities that Respondent purchased, received, and accepted in interstate or foreign commerce in willful violation of section 2(4) of the

PACA (7 U.S.C. § 499b(4)).[4]

Third, Respondent asserts that prior to the commencement of this proceeding, Respondent and its produce creditors entered into an agreement that calls for payment to be made by Respondent to its produce creditors over a period of time exceeding 30 days. Respondent contends, as a consequence of this agreement, Complainant no longer has a "statutory interest" in transactions that are the subject of the Complaint, as follows:

> It is well settled that in the event parties to a produce transaction agree in writing to payment terms that exceed thirty (30) days, the transaction no

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[4]Complainant, as the proponent of an order, has the burden of proof in this proceeding conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)). The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). It has long been held that the standard of proof in administrative disciplinary proceedings conducted under the PACA is preponderance of the evidence. *In re Mangos Plus, Inc.*, 59 Agric. Dec. 392, 399 n.2 (2000), *appeal voluntarily dismissed*, No. 00-1465 (D.C. Cir. Aug. 15, 2001); *In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 566-67 (1999); *In re Produce Distributors, Inc.* (Decision as to Irene T. Russo, d/b/a Jay Brokers), 58 Agric. Dec. 506, 534-35 (1999), *aff'd sub nom. Russo v. United States Dep't of Agric.*, 199 F.3d 1323 (Table), 1999 WL 1024094 (2d Cir. 1999), *printed in* 58 Agric. Dec. 999 (1999), *cert. denied*, 531 U.S. 928 (2000); *In re JSG Trading Corp.* (Decision as to JSG Trading Corp., Gloria & Tony Enterprises, d/b/a G&T Enterprises, and Anthony Gentile), 57 Agric. Dec. 640, 685-86 (1998), *remanded*, 176 F.3d 536 (D.C. Cir. 1999), *reprinted in* 58 Agric. Dec. 474 (1999), *final decision on remand*, 58 Agric. Dec. 1041 (1999), *aff'd*, 235 F.3d 608 (D.C. Cir.), *cert. denied*, 122 S. Ct. 458 (2001); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1893 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 927 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1021 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 55 Agric. Dec. 1234, 1247 n.2 (1996), *aff'd*, 136 F.3d 89 (2d Cir. 1997); *In re Midland Banana & Tomato Co.*, 54 Agric. Dec. 1239, 1269 (1995), *aff'd*, 104 F.3d 139 (8th Cir. 1997), *cert. denied sub nom. Heimann v. Department of Agric.*, 522 U.S. 951 (1997); *In re John J. Conforti*, 54 Agric. Dec. 649, 659 (1995), *aff'd in part & rev'd in part*, 74 F.3d 838 (8th Cir. 1996), *cert. denied*, 519 U.S. 807 (1996); *In re DiCarlo Distributors, Inc.*, 53 Agric. Dec. 1680, 1704 (1994), *appeal withdrawn*, No. 94–4218 (2d Cir. June 21, 1995); *In re Boss Fruit & Vegetable, Inc.*, 53 Agric. Dec. 761, 792 (1994), *appeal dismissed*, No. 94–70408 (9th Cir. Nov. 17, 1994); *In re Full Sail Produce, Inc.*, 52 Agric. Dec. 608, 617 (1993); *In re Lloyd Myers Co.*, 51 Agric. Dec. 747, 757 (1992), *aff'd*, 15 F.3d 1086, 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36–3), *printed in* 53 Agric. Dec. 686 (1994); *In re Tipco, Inc.*, 50 Agric. Dec. 871, 872-73 (1991), *aff'd per curiam*, 953 F.2d 639, 1992 WL 14586 (4th Cir.), *printed in* 51 Agric. Dec. 720 (1992), *cert. denied*, 506 U.S. 826 (1992); *In re Sid Goodman & Co.*, 49 Agric. Dec. 1169, 1191-92 (1990), *aff'd per curiam*, 945 F.2d 398, 1991 WL 193489 (4th Cir. 1991), *printed in* 50 Agric. Dec. 1839 (1991), *cert. denied*, 503 U.S. 970 (1992); *In re Valencia Trading Co.*, 48 Agric. Dec. 1083, 1091 (1989), *appeal dismissed*, No. 90-70144 (9th Cir. May 30, 1990); *In re McQueen Bros. Produce Co.*, 47 Agric. Dec. 1462, 1468 (1988), *aff'd*, 916 F.2d 715, 1990 WL 157022 (7th Cir. 1990); *In re Perfect Potato Packers, Inc.*, 45 Agric. Dec. 338, 352 (1986); *In re Tri-County Wholesale Produce Co.*, 45 Agric. Dec. 286, 304 n.16 (1986), *aff'd per curiam*, 822 F.2d 162 (D.C. Cir. 1987), *reprinted in* 46 Agric. Dec. 1105 (1987).

> longer falls within the trust provisions of the PACA and the parties cannot avail themselves of the rights, protection and remedies of the PACA. In effect, the parties waive their rights under the PACA and, in doing so, recognize that they do not need or desire the protection of the statute or the administrative agency, in this case the Complainant, to enforce the provisions of the PACA. As a consequence, the Complainant no longer has a statutory interest in the transactions that are the subject matter of this complaint.

Respondent's October 22, 2001, Appeal Pet. at 5 (emphasis in original).

Section 46.2(aa)(11) of the Regulations (7 C.F.R. § 46.2(aa)(11)) provides that parties to a transaction involving perishable agricultural commodities may elect to use different times of payment than those set forth in section 46.2(aa)(1)-(10) of the Regulations (7 C.F.R. § 46(aa)(1)-(10)). Any such agreement must be reduced to writing before the parties enter the transaction regarding perishable agricultural commodities and the party claiming the existence of the agreement has the burden of proving it. The record contains no evidence that Respondent entered into a written agreement with any of its produce sellers for extended payments prior to the transactions which are the subject of this proceeding.

Respondent did introduce evidence that in 1996, after Respondent stopped doing business, Respondent entered into an agreement with its creditors in accordance with which Respondent was to pay its debts over an extended period of time (Tr. 90-93). However, such an agreement does not constitute a basis for Respondent's contention that "Complainant no longer has a statutory interest in the transactions that are the subject matter of [the C]omplaint." (Respondent's October 22, 2001, Appeal Pet. at 5).

Fourth, Respondent contends that it is entitled to due process and has been denied due process (Respondent's October 22, 2001, Appeal Pet. at 6).

The Fifth Amendment to the Constitution of the United States provides that no person shall be deprived of life, liberty, or property, without due process of law. I agree with Respondent that it is entitled to due process in this proceeding. However, I disagree with Respondent's contention that it was denied due process in this proceeding. The record clearly establishes that Respondent was given notice of the proceeding in accordance with both the due process clause of the Fifth Amendment to the Constitution of the United States and the Administrative Procedure Act (5 U.S.C. § 554(b)). Further, Respondent was given an opportunity for a hearing and Respondent took advantage of that opportunity.

Finally, Respondent requests a new hearing in order to preserve Respondent's rights and ensure confidence in and integrity of the disciplinary system. Respondent

states that during this new hearing "a through [sic] presentation of all the evidence and issues should be considered." (Respondent's October 22, 2001, Appeal Pet. at 6.)

Section 1.146(a)(2) of the Rules of Practice provides that a party may petition to reopen a hearing, as follows:

> **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**
>
> (a) *Petition requisite*. . . .
> . . .
> (2) *Petition to reopen hearing*. A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2).

I deny Respondent's petition for a new hearing because Respondent has not stated the nature and purpose of the evidence to be adduced. Moreover, Respondent has not set forth a good reason for Respondent's failure at the November 17, 1999, hearing to adduce evidence that Respondent now wants to adduce. Finally, Respondent does not identify the issues in this proceeding which it believes should be considered that have not been considered.

Sanction

The Judicial Officer's former policy, which was adopted in *In re Gilardi Truck & Transportation, Inc.*, 43 Agric. Dec. 118 (1984), and is applicable to this proceeding, had been to revoke the license of any PACA licensee who failed to pay in accordance with the PACA and owed more than a *de minimis* amount to produce sellers by the date of the hearing or, if no hearing was held, by the time the answer was due. Cases in which a respondent had failed to pay by the date of the hearing were referred to as "no-pay" cases. License revocation could be avoided and the suspension of a license of a PACA licensee who failed to pay in accordance with the PACA would be ordered if a PACA violator made full payment by the date of the hearing (or, if no hearing was held, by the time the answer was due) and was in full compliance with the PACA by the date of the hearing. Cases in which a respondent had paid and was in full compliance with the PACA by the time of the

hearing were referred to as "slow-pay" cases. The *Gilardi* doctrine was subsequently tightened in *In re Carpenito Bros., Inc.*, 46 Agric. Dec. 486 (1987), *aff'd*, 851 F.2d 1500, 1988 WL 76618 (D.C. Cir. 1988), by requiring that a respondent's present compliance not involve credit agreements for more than 30 days.[5]

PACA license revocation is the appropriate sanction in a "no-pay" case. However, Respondent chose not to renew its PACA license and thereby allowed its license to lapse on February 4, 1999. Whenever the Secretary of Agriculture determines that a commission merchant, dealer, or broker has violated section 2(4) of the PACA (7 U.S.C. § 499b(4)), the Secretary of Agriculture is authorized to publish the facts and circumstances of the violation. 7 U.S.C. § 499h(a). In light of the lapse of Respondent's PACA license, the appropriate sanction for Respondent's violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)) is the publication of the facts and circumstances of Respondent's violations.

For the foregoing reasons, the following Order should be issued.

ORDER

Respondent has committed willful, repeated, and flagrant violations of section 2(4) of the PACA (7 U.S.C. § 499b(4)). The facts and circumstances set forth in this Decision and Order on Remand shall be published, effective 60 days after service of this Order on Respondent.

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[5] In *In re Scamcorp, Inc.*, 57 Agric. Dec. 527 (1998), the Judicial Officer changed the "slow-pay/no-pay" policy. However, the new policy applies to PACA disciplinary cases instituted after January 25, 1999, the date *In re Scamcorp, Inc.*, was published in *Agriculture Decisions*, or after personal notice of *In re Scamcorp, Inc.*, served on a respondent, whichever occurs first. The instant proceeding was instituted before January 25, 1999, and neither party alleges that Respondent was given personal notice of *In re Scamcorp, Inc.* Moreover, application of the new "slow-pay/no-pay" policy to this proceeding would not change the disposition of this proceeding.